Office Supre
F
AU

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 217

STROEHMANN BROTHERS COMPANY and QUALITY BAKERS OF AMERICA COOPERATIVE, INC.,

Petitioners,

v.

HUBER BAKING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPELL, AUSTIN & GAY
Attorneys for Respondent
30 Rockefeller Plaza
New York 20, N. Y.

CYRUS AUSTIN

LENORE B. STOUGHTON
ROGERS, HOGE & HILLS
41 East 42nd Street
New York 17, N. Y.
Of Counsel

INDEX

	PAGE
Statement of the Case	1
Summary of the Facts	2
Grounds of the Decision Below	11
I—This Case Does Not Present a Federal Question Calling for Decision by this Court	13
II—The Decision Below Is Not in Conflict with the Decision of Another Court of Appeals	16
III—The Decision of the Court of Appeals Is Not in Conflict with Controlling Decisions of State Courts	17
IV—The Opinion of the Court of Appeals Is Not "Incomplete", "Unclear" or "Confusing", Nor Has That Court Disregarded the Trial Court's Findings of Fact	18
V—The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit Should Be Denied	19

Cases and Authorities Cited

Panaview Door & Window Co. v. Reynolds Metals Company, 116 U.S.P.Q. 493	16
Parkway Baking Co. v. Freihofer Baking Co., 154 F. Supp. 823	15
Lanham Act	7, 14
Sec. 1057b	14
Sec. 1115a	14
Federal Rules of Civil Procedure, Rule 60	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 217

STROEHMANN BROTHERS COMPANY and QUALITY BAKERS OF AMERICA COOPERATIVE, INC.,

Petitioners,

v.

HUBER BAKING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This case turned principally upon the construction of two agreements entered into by and between Huber Baking Company (plaintiff below) and Quality Bakers of America Cooperative, Inc. (a defendant below) in 1944. In conformity with the petition the parties will be referred to as "Huber", "Stroehmann" and "QBA".

The question involved was as to the respective rights of Huber and QBA in certain marks used for the identification of bread, in the territory defined and reserved to Huber by the two agreements. Stroehmann claimed the

right to use these marks solely as licensee of QBA and only in territory granted it by QBA.

The marks concerned are the word "Sunbeam", of which **Huber was the prior, continuous and exclusive user** in its territory from 1913 until the time of defendants' acts here complained of (end of 1951), and the picture or representation of the head and shoulders of a little girl (usually depicted eating a slice of bread) of which Huber was also the prior and exclusive user in said territory from and after 1942.

The sole issue was whether Huber, as against QBA and Stroehmann, had the exclusive right to the use of these marks in the territory defined in the two agreements. This territory was described in each of the agreements as follows:

> "The entire State of Delaware, together with such portions of the States of Maryland, Pennsylvania and New Jersey as are included within the black divider line on the attached map, including the City of Philadelphia, as shown upon the attached map and the cities or towns of Cochranville, West Chester and Media, even though some of the said territory is not at present served by the Huber Baking Company." (Exs. 3 and 4 annexed to complaint, Rec. 16a, 20a)

Huber claimed no rights in either mark outside the said territory. QBA and Stroehmann denied that Huber had the exclusive right to the use of the marks in any part of said territory.

Summary of the Facts

The salient and undisputed facts upon which this action was brought and decided are not set forth in the petition. As stated by the trial court, "most of the underlying facts here are not really in dispute" (Pet. p. 2b). The Court

of Appeals prefaced its recital of the facts by pointing out that "none of [them] are in serious dispute" (Pet. p. 11b).

Huber operates a single bakery in Wilmington, Delaware, incorporated in 1913 to continue the business carried on since 1888 under the name "Huber's Bakery" (Rec. 72a). Huber is engaged principally in the production and sale of bread and rolls which it distributes to grocers, food markets and restaurants throughout the State of Delaware and in parts of Maryland, southern New Jersey and southeastern Pennsylvania, including the City of Philadelphia. In Philadelphia Huber operates fourteen delivery routes, with annual sales of "Sunbeam" bread and rolls amounting to more than $500,000 (Rec. 318-19a).

Stroehmann is a Pennsylvania corporation operating a chain of six bakeries, five located in Pennsylvania and one in Olean, New York. From its Norristown bakery on the outskirts of Philadelphia Stroehmann has for many years competed with Huber in parts of that city. Prior to 1952 Stroehmann sold its bread in Philadelphia under its "Pride Winner" and other marks, and most of its sales are still under those marks (Rec. 509-10a, 755a).

QBA is a bakers' cooperative organized under the laws of the State of New York. Huber and Stroehmann are members and stockholders in QBA. The president of Stroehmann also was an officer and director of QBA during the period with which this action is concerned.

Huber adopted and used the words "Sun-Beam" as a trademark for its bread in 1913. In that year it began using a small label bearing the words "Huber's Sun-Beam Bread", and copyright registration of this label was obtained (Rec. 632a). Prior to 1920, when waxed paper wrappers came into use, the original label was discontinued and Huber thereafter used wrappers bearing the name "Sunbeam" (Rec. 77a). From then until 1942 Huber continuously employed its "Sunbeam" trademark in various

styles and designs on one or more types of bread made and sold by it. Certain other brands were also used from time to time, but "Sunbeam" was the only mark used continuously from 1913 to 1942 (Rec. 77-8a).

In 1941 Huber was approached with regard to membership in QBA. The services offered by QBA included the handling of members' individual advertising requirements and the designing of trademarks and wrappers at member's expense. A preliminary discussion took place, at which time Huber stated that it wanted to replace its several brands of bread with one brand, and was interested in the development of an advertising campaign for its trademark "Sunbeam", with an attractive bread wrapper featuring a child or children (Rec. 96a, 100a). An understanding was reached that QBA would undertake to prepare such an advertising campaign for Huber, subject to Huber's approval. Huber told QBA that in consideration of that service, and after reserving certain territory to be marked on a map, it "would then give outside of that territory any and all rights we had to the name Sunbeam or the trademark Sunbeam that we had copyrighted back in 1913 to Quality Bakers to be used by them if they cared to for the benefit of their other members". It was suggested that QBA have its attorneys draw up such an agreement (Rec. 97-99a).

An "agreement" in form of an assignment placing this 1941 oral understanding in writing was later prepared by QBA's attorneys and submitted to Huber, and was one of the two agreements executed by Huber on December 26, 1944 (Rec. 16-19a). QBA acknowledged that this assignment was "in accordance with the understanding which we had with you and your father at the time the negotiations were started" (Rec. 685a). The assignment reserved to Huber "the full and unrestricted right" to the use of the "Huber's Sunbeam Bread" label and each and every part thereof within the trading areas specified.

In November 1941 Huber signed a membership agreement with QBA (Rec. 634-42a), and shortly thereafter QBA began preparation of an advertising campaign for Huber's "Sunbeam". QBA had previously been working on a child's head design. However, in January 1942 QBA twice wrote Huber advising against attempting "your idea of using a child's head" in colors at that time, due to war time packaging restrictions, but Huber decided to take that risk and directed QBA to proceed with the wrapper (Rec. 644a, 647-8a). Various sketches were made and submitted to Mr. Huber for approval (Rec. 591-4a, 603a). In April, 1942, a color drawing of the present little girl's head was decided upon. Up to that time there was no assurance that any other member of QBA would like or use the girl's head wrapper. However, in the summer of 1942 a baker in Cleveland decided to adopt this wrapper, and QBA wrote Huber that "Our attorney is now preparing agreements, copyrights, etc. for the new Sunbeam package and also for the licensing of the name 'Sunbeam' to Quality Bakers of America." (Rec. 658a)

QBA thus recognized Huber's ownership of the "Sunbeam" trademark in its territory and the necessity for obtaining a "license" or assignment of this mark *from Huber*, with a delineation of the territory which Huber reserved, so that QBA could safely license this mark along with the little girl's head to bakers in other areas. As found by the Court of Appeals, this recognition of Huber's prior trademark rights in "Sunbeam", evidenced by the reservation of Huber's "full and unrestricted" territorial rights in the assignment which QBA prepared, was the basis for all the negotiations leading up to the execution of the two agreements in 1944. QBA acknowledged that "the case of the Sunbeam wrapper is a special case insofar as you are concerned" (Rec. 679a).

Huber commenced the use of the new "Sunbeam" wrappers and advertising on September 14, 1942, and discon-

tinued its other brand names. From that time up to the present Huber has sold and advertised its bread and rolls under the "Sunbeam" and "Miss Sunbeam" trademarks throughout its territory, including Philadelphia. Petitioners incorrectly state that "The loaf he sells in Philadelphia is not the subject of this suit." It is undisputed that Huber sold its bread in the regular blue and white "Sunbeam" wrapper over all of its routes in Philadelphia from September 1942 up to the time of trial (Rec. 117a, 121a). Furthermore, the distinctive end seals bearing the picture of "Miss Sunbeam" were used on Huber's "Old Time" loaf (an additional loaf introduced in 1948) as well as on its standard "Sunbeam" loaf (Rec. 453a). These end seals positively identify Huber's bread, not QBA, to consumers (Rec. 142-3a, 148a, 167a, 515a, 525a).

The original "Sunbeam" wrapper and newspaper advertisement displaying the picture of the little girl (Exhibits 23 and 24), prepared by QBA for Huber's use in breaking its new "Sunbeam campaign" in 1942, contained no mention of or reference to QBA or to Huber's membership in QBA. The new campaign held out and used both "Sunbeam" and the little girl as marks solely identifying Huber's goods. The undisputed testimony of the nine consumer witnesses and three grocers called by Huber establishes that both the little girl and "Sunbeam" now identify Huber's products solely—not membership in QBA—in Huber's territory (Rec. 142a, 146a, 151a, 159a, 165a, 173a, 513a, 518a, 520a, 524a, 528a, 531a).

In 1943, after Huber had already been using the picture of the little girl on its "Sunbeam" wrappers for nearly a year, QBA registered the picture of the little girl in the Patent Office as a collective mark (Rec. 65a). The registration contains the following assertion of control by QBA:

> "The collective mark is used upon the goods to indicate that the goods are inspected, from time to

time, in applicant's laboratory and quality thereof approved and that such persons so authorized to use same are members of the applicant cooperative corporation."

The word "Sunbeam" was never registered by QBA as a collective mark under the Lanham Act.

The execution of the assignment of Huber's rights in "Sunbeam" outside its reserved territory was delayed until 1944 due to the fact that Huber insisted that it have at the same time a contract with QBA assuring Huber the perpetual and exclusive right within its territory to the use of the little girl's picture and wrapper, including the right of assignment to a purchaser of its business. The negotiations with regard to this contract are shown by the correspondence (Rec. 677-699a).

The two agreements (Rec. 16a, 20a) were signed by Huber and forwarded to QBA on December 26, 1944. Neither of these agreements limits Huber's use of either mark, or of the "Sunbeam campaign", to the term of Huber's membership in QBA or to products approved as to quality by QBA. The reservation in the assignment of the "full and unrestricted right" to the use of "Sunbeam", on the other hand, expressly negatives any inference that Huber's use of "Sunbeam" was intended to be limited to use as a collective mark. The control and very existence of a collective mark depend upon restriction of its use to the organization claiming it.

The "Sunbeam campaign" contract, likewise, contains no limitation to term of membership and no provision for quality control. This contract in terms grants Huber the perpetual right to the use of the "Sunbeam" campaign in the defined territory, with the right of assignment "to any organization which may purchase the Huber Baking Company outright and continue its operation". It was

provided that the limitation on Huber's use of the campaign as designed by QBA "shall not apply at such time as Huber may cease to be a member of QBA".*

The Court of Appeals held that the contract and the assignment must be read and construed together in determining the extent of the rights granted and reserved, and that both instruments should be read in the light of Huber's prior exclusive ownership of "Sunbeam" in its territory.

---

* On May 23, 1944 plaintiff wrote QBA "we * * * want to be sure that in the contract we sign the Huber Baking Company has the perpetual and exclusive rights to the Sunbeam name and wrapper, and in the event that this bakery should be sold, the right to assign the name and wrapper to the new owner" (Rec. 692-3a). After revised contracts had been submitted, plaintiff wrote on July 5, 1944 (Rec. 695a):

> "Although we have no intention of discontinuing our membership in QBA, we do believe that some provision should be included in the event that we are no longer members of Quality Bakers. For this reason, we would like to have the contract drawn between QBA and 'Huber' rather than 'Member'.
>
> "All references to 'so long as Huber remains a member of QBA' should also be omitted.
>
> "Regarding the purchase of advertising, wrapping paper, etc., we will, of course, purchase from QBA so long as we are members of that organization provided that *in our judgment* it is not to our disadvantage to do so."

These changes were made, and QBA replied on August 4, 1944, that

> "In the second paragraph we only require that you use the Sunbeam campaign, etc., as designed by us as long as you remain a member. If you wish, we could add to this second clause specifically that should you withdraw from membership in Quality Bakers of America, you would not have to follow our wishes in the matter of design, etc.
>
> "The first clause of the contract gives you the right to convey the Sunbeam campaign to anyone who may buy the Huber Baking Company regardless of whether they are a member of Quality Bakers of America or not." (Rec. 697-8a)

After the new "Sunbeam" campaign proved successful, Stroehmann, over a period of seven years after the signing of the two agreements, repeatedly attempted to persuade QBA and Huber to permit it to use the "Sunbeam" marks in Philadelphia on the ground that both Stroehmann and Huber would benefit by a joint advertising campaign. Huber always refused to agree to this and on each occasion vigorously asserted its exclusive rights in its territory. (See Pl's. Exs. 48-52, 91-102; Rec. 700-5a, 718-36a.) On each occasion QBA recognized and acceded to Huber's claim of exclusive right and refused to give Stroehmann a Philadelphia license (Rec. 704-5a, 722a, 725a, 727a).*

In 1951 Huber purchased a lot consisting of 64,000 square feet in Philadelphia for the construction of a bakery to adequately serve that city (Rec. 127-8a). Shortly thereafter Stroehmann made a formal application to the QBA Board of Directors for an extension of its "Sunbeam"

---

* On November 6, 1947, QBA wrote Huber that "we are just as glad as you are that all uncertainties concerning the use of advertising material in the territory granted to you on our 'Sunbeam' map have been eliminated" (Rec. 722a).

On December 3, 1947, in response to a complaint by Huber about the use by Stroehmann of certain end seals bearing the little girl's picture in Philadelphia, QBA's General Manager replied:

> "I am today writing Mr. Stroehmann about this and it is my understanding that no 'Sunbeam' material will be used in your territory by other members." (Rec. 725a)

In January, 1950, QBA licensed Stroehmann to use the campaign in the territory served from each of its six plants, the license for the Norristown plant, however, excluding the City of Philadelphia. On September 15, 1950, in response to a further complaint by plaintiff, QBA wrote:

> "Thanks for your letter of September 11th concerning the use of Sunbeam advertising in your territory. I will discuss this with Leonard Thompson and I am sure that this will be discontinued immediately. Undoubtedly the advertising got into this store by mistake." (Rec. 726-7a)

license to include Philadelphia. Stroehmann offered to indemnify QBA up to $100,000 against any lawsuits and legal expenses which might be brought against or incurred by QBA as a result of such action (Rec. 750-1a). On December 12, 1951, QBA granted Stroehmann's application, and Stroehmann thereupon gave QBA an indemnity agreement in an unlimited amount "against any and all actions, suits, claims or demands that may be made or brought against them * * * by Huber Baking Company", including legal expenses (Rec. 754a).

About the beginning of 1952 Stroehmann began distributing and selling "Stroehmann's Sunbeam Bread" in Philadelphia. Stroehmann's "Sunbeam" wrappers, labels, end seals, etc., used in Philadelphia, were obtained from QBA and were substantially identical with the standard "Sunbeam" wrappers, labels and seals used by Huber, except that Stroehmann's name appeared instead of Huber's. Stroehmann's answer admitted that its bakery products are displayed and sold in groceries, self-service markets and other food stores of the same types as those in which Huber's products are sold, and that Stroehmann's bread and Huber's bread are likely to be displayed for sale side by side (Rec. 9a, 45a).

The complaint charged Stroehmann with trademark infringement and with unfair competition. QBA was charged with contributory infringement and unfair competition through having licensed Stroehmann to use the "Sunbeam" marks in Philadelphia and through having supplied Stroehmann with "Sunbeam" wrappers and advertising. It was alleged that QBA's licensing of Stroehmann to use said marks in the territory covered by QBA's agreements with Huber violated those agreements; and Stroehmann was charged with abetting and inducing such violation, all to Huber's irreparable injury.

Grounds of the Decision Below

The decision of the Court of Appeals was placed upon two grounds:

(1) That QBA, and Stroehmann as its licensee, were estopped to question Huber's exclusive right to the use of the "Sunbeam campaign" in the territory specified in the two 1944 agreements, and that this estoppel stems not only from the agreements but from "the whole course of dealing between the parties, both before and after the execution of the two documents"; (2) that the "Sunbeam campaign" contract "construed in the light of the assignment and the pertinent extrinsic evidence" granted Huber the exclusive right to the marks and campaign in the designated territory.

The Court of Appeals did not find it necessary to decide the question of trademark rights. It did conclude that, since "Sunbeam" and the little girl's picture both were used on most of the bread wrappers and the little girl had become known as "Miss Sunbeam", the mark "Sunbeam" had become "merged in the 'Sunbeam campaign'". Huber's claim of continued common law trademark rights in the word "Sunbeam", and its claim that the contract, by granting the unlimited right of use of both marks with provision for continuation of use after membership and for assignment to any purchaser of the business, constituted an effective contractual abandonment of collective control in the defined territory upon the occurrence of either event, were expressly left undecided. The only question presented upon the facts at the time of the trial was whether Huber's right to the use of "Sunbeam" and "Miss Sunbeam" in its territory was exclusive as against QBA and Stroehmann, and the Court of Appeals limited its decision to that question.

The following paragraphs of the opinion fully state the grounds of the decision below:

"We conclude that the contract and the assignment should be read together, and that both instruments should be read in the light of the exclusive right which Huber, prior to its assignment to QBA, had to the mark 'Sunbeam' in the reserved territory, and against the circumstantial background to which reference has been made. We hold that under the contract so construed it was reasonably plain that Huber was intended to have the exclusive use of the Sunbeam campaign in the designated territory.

• • •

"We hold that Huber did reserve the exclusive right to use 'Sunbeam' vis-a-vis QBA in the territory specified in the assignment. The assignment was accepted, the whole course of dealing between the parties, both before and after the execution of the two documents on December 26, 1944, is a recognition, not only of Huber's exclusive right to use 'Sunbeam' in the territory specified but also the exclusive right to use therein the entire Sunbeam campaign, including the picture of the little girl and other Sunbeam advertising prepared by QBA in collaboration with Huber, and Huber acted throughout in reliance on such recognition of its rights. This is all that is necessary to establish an estoppel *inter partes*.

• • •

"Accordingly, in the view we take of the case, the acceptance of the assignment, which reserved "full and unrestricted" trademark rights to Huber in the designated area, and which involved a mark that of necessity had become merged in the overall campaign then in progress, gave rise to a valid and binding estoppel against QBA. In other words, we hold QBA

and necessarily its alleged licensee Strochmann, estopped to question Huber's exclusive rights, within the territory specified in the assignment, to the use of the 'Sunbeam campaign.' And as an independent ground of decision we hold that Huber's license construed in the light of the assignment and the pertinent extrinsic evidence carried exclusive right to the Sunbeam campaign in the designated territory."

I

This Case Does Not Present a Federal Question Calling for Decision by this Court

The petition for certiorari throughout ignores the fact that the principal ground of the decision below was equitable estoppel *inter partes*, although the Court of Appeals "as an independent ground of decision" also construed the 1944 contract as granting Huber the exclusive right to the use of the "Sunbeam campaign" in the territory defined. Neither of these issues presents a federal question. Petitioners' principal complaint seems to be with the Court's construction of the contract; the petition does not appear even to ask for review of the decision below in so far as based on estoppel.

The petition states that this case involves the relationship among members of a non-profit cooperative corporation. Certainly that is not a federal question. Furthermore, the case does not involve the relationship between members of the cooperative. It involves the question of the construction and effect of agreements entered into between Huber and QBA in the light of their negotiations and dealings prior and subsequent thereto, under the peculiar facts of this case.

It is true that the Court of Appeals in its opinion devoted some space to consideration of whether federal law or state law should be applied in construing the agreements.

The Court concluded, however, that "regardless of whether federal or state law is controlling in the case at bar, we do not think the case law on the subject supports the arbitrary rule of interpretation for which QBA and Strochmann contend, as above stated, and we conclude that the agreement is governed by the same rules as are applicable to the interpretation of contracts generally".

No question of construction of the Lanham Act is here presented. That Act recognizes collective marks to the extent of permitting their registration by one exercising "legitimate control", and defines a collective mark for the purposes of registration. There was no contest here as to the validity of QBA's registration of the picture of the little girl. The decision below presents no question either as to the definition of a collective mark or as to the "legitimate control" necessary to register and preserve such a mark. The decision is based solely upon Huber's exclusive right to the use of said marks in its agreed territory, by estoppel and under the agreements.

Furthermore the Lanham Act (Sec. 1057b) merely makes a certificate of registration prima facie evidence of validity and ownership; and by Sec. 1115a it is provided that such registration "shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered."

Petitioners now attempt to argue that it was *ultra vires* for QBA to grant one of its members the exclusive right to use the "Sunbeam campaign" in certain territory. QBA's position seems to be that it could lawfully apportion territory among its members for use of this campaign and give any member the exclusive right of use in certain territory by refusing to license others therein, but that it could not agree to do so. Neither QBA nor Strochmann has heretofore contended that it was unlawful for QBA to restrict a member's use of the campaign to a defined

territory or that a member could lawfully use the campaign outside the territory designated in its license. Obviously, an organization controlling a collective mark, like the owner of a trademark, can grant an exclusive license for the use of the mark in a limited area.* Whether the rights granted Huber by its contract with QBA were in excess of those of a mere licensee, as contended by Huber, and were not dependent on membership in the cooperative, was expressly left undecided and is not a federal question.

The Court of Appeals has pointed out that it is "clear that such an agreement between QBA and Huber to give Huber the exclusive right to use the Sunbeam mark within a specified area was valid and not contrary to the public interest." The trademark "Sunbeam" had identified Huber's goods in its territory since 1913, and the undisputed evidence is that both "Sunbeam" and the little girl have continued to identify Huber's products to the consuming public. Even assuming (although not found by either court) that these marks have to some extent come, or might come, to signify membership in QBA as well, there would be no deception of the public while Huber remains a member of QBA. As stated by the Court of Appeals, the contract served "a legitimate business purpose", since it was made by QBA contemporaneously with and in consideration for Huber's assignment and quitclaim of rights in its trademark "Sunbeam" which QBA could not otherwise have obtained.

QBA argues, in effect, that it should keep all the benefits of its arrangements and agreements with Huber, but that the rights reserved and retained by Huber should not now be recognized because QBA is a cooperative. There is

---

* See *Parkway Baking Co.* v. *Freihofer Baking Co.*, 154 F. Supp. 823 (cited by petitioners) where exclusive territorial licenses of a trademark for bread were granted and enforced.

no federal question involved in such an argument, nor is there any legal or moral justification for the result sought by QBA.

II

The Decision Below Is Not in Conflict with the Decision of another Court of Appeals

The decision of the Court of Appeals in this case is not in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Panaview Door & Window Co.* v. *Reynolds Metals Company*, reported in 116 U.S.P.Q. 493. That case involved the manufacture and sale of certain aluminum extrusions by Reynolds from dies prepared according to specifications furnished by Panaview. The question was whether the contract under which Reynolds furnished the extrusions to Panaview prohibited Reynolds from selling extrusions made from the same dies to other customers. There is no similarity between either the contracts or the circumstances there and here. There was no reservation of rights by Panaview, nor did that case involve a license to use, much less a trademark license.

Here the Court of Appeals expressly has held that the contract between Huber and QBA is ambiguous; that "since the contract is ambiguous on its face we must look at the circumstances surrounding its formulation in aid of interpreting the agreement"; that "the contract and the assignment should be read together"—which the trial court failed to do; and "that both instruments should be read in the light of the exclusive right which Huber" had previously had, "and against the circumstantial background".

This was entirely in accord with the views expressed by the Ninth Circuit in the *Panaview* case as to the proper approach to such a situation. Speaking of some of the evidence in that case, the court said (116 U.S.P.Q. 496):

> "Where the language of a contract is ambiguous, the court must endeavor to find that meaning which represents the intent of the parties when the contract was executed. One permissible course in searching for such intent is to examine the circumstances under which the contract was made and the matters to which it relates."

Upon such examination the court confirmed its original view that the contract did not require Reynolds to sell extrusions made from its dies exclusively to Panaview, but it added (p. 497):

> "If we should * * * hold that on the entire record it is clear a mistake has been made, we could, of course, reverse."

III

The Decision of the Court of Appeals Is Not in Conflict with Controlling Decisions of State Courts

The decision here is not in conflict with any state court decisions cited by petitioners, much less with any controlling state court decisions.

In its opinion the Court of Appeals reviewed some of the cases now cited by petitioners and concluded that they were not controlling here. Indeed, it observed that those cases were "readily distinguishable", "not persuasive when applied to the fact situation now before us", and "in addition, it is not clear that they formulate a rule of law even if state law be applicable". The Court subsequently pointed out that "another difficulty with the statement of law in these Pennsylvania and New York cases as applied to the facts of the case at bar, is that there are other cases in those states the rules of which, when applied to the Huber license, would lead to a contrary result". Petitioners' real complaint here is not that the wrong

rules have been applied, but that they do not like the result.

We wish to emphasize again that the decision of the Court of Appeals is based upon two independent grounds, one of which grounds is equitable estoppel. A construction of the agreements between Huber and QBA as providing for exclusivity of use is not prerequisite to the conclusion that they "gave rise to a valid and binding estoppel". Petitioners cite no federal case and no state case in conflict with the decision of the Court of Appeals that the facts here present "all that is necessary to establish an estoppel *inter partes*".

IV

The Opinion of the Court of Appeals Is Not "Incomplete", "Unclear" or "Confusing", Nor Has that Court Disregarded the Trial Court's Findings of Fact

If the opinion of the Court of Appeals were incomplete or confusing, petitioners' proper recourse was a petition for rehearing and for clarification, rather than a review by this Court.

The opinion is not "incomplete" in failing to decide what Huber's rights would be upon termination of its membership in QBA. That situation has not arisen and may never arise. If it should arise the circumstances of loss of membership, whether voluntary or involuntary, and the significance and manner of usage of the "Sunbeam" marks at the time, might have great bearing upon the subsequent rights. The court correctly refused to speculate by attempting to define future rights in circumstances as yet unknown.

The Court of Appeals correctly granted a permanent injunction not dependent upon Huber's membership in QBA or QBA quality control. Huber's rights under the

two agreements are not so limited: neither agreement limits the right of use granted or reserved to the term of Huber's membership in QBA or to products approved by QBA. The contract explicitly contemplates continuation of the right of use after termination of membership. Petitioners will at all times have recourse to F.R.C.P. Rule 60 in the event that a future change of circumstances should justify modification of the injunction.

The Court of Appeals did not disregard the findings of the trial court. As both courts found, there was little, if any, dispute as to the material facts. If the trial court reached a clearly erroneous result, whether by mistake of fact or by mistaken conclusion in interpreting the facts, or by mere failure to consider all of the evidence, the Court of Appeals is not bound by the error below, nor is it bound to use the term "clearly erroneous" in correcting the error.

V

It is submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

APPELL, AUSTIN & GAY
Attorneys for Respondent
30 Rockefeller Plaza
New York 20, N. Y.

CYRUS AUSTIN

LENORE R. STOUGHTON
ROGERS, HOGE & HILLS
Of Counsel